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June 24, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, N.W.
Washington, DC 20554

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JUN 24 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

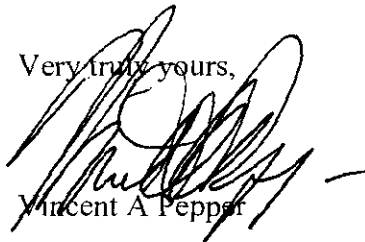
Re: File No.: BPCT-960920IT
File No.: BPCT-960920WI

Dear Ms. Dortch:

Transmitted herewith on behalf of Television Capital Corporation of Richmond are an original and four (4) copies of Response to Opposition to Motion to Accept Previously Filed Amendment to Petition for Rule Making tendered in the above-reference proceeding.

Should any further information be desired in connection with this matter, please communicate with this office.

Very truly yours,



Vincent A Pepper

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 24 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Matter of)	
)	
Amendment of Section 73.606(b))	MM Docket No. _____
Table of Allotments,)	RM- _____
Television Broadcast Stations)	
Richmond, Virginia)	
)	
In re Applications of)	
)	
United Television, Inc.)	File No. BPCT-960920IT
)	
Television Capital Corporation of)	File No. BPCT-960920WI
Richmond)	
)	
For a Construction Permit for a New)	
Television Broadcast Station on)	
Channel 63 in Richmond, Virginia)	

To: Chief, Video Services Division
Media Bureau

**RESPONSE TO OPPOSITION TO MOTION TO ACCEPT PREVIOUSLY FILED
AMENDMENT TO PETITION FOR RULE MAKING**

Television Capital Corporation of Richmond ("TCC"), by its attorneys hereby replies to the "Opposition of Bell Broadcasting to Motion to Accept Previously Filed Amendment to Petition for Rule Making" ("*Opposition*") filed on behalf of Bell Broadcasting, Inc., the licensee of WUPV, Ashland, Virginia ("Bell").¹ Bell's pleading is little more than a thinly-disguised attempt to delay and impede this proceeding, and raises no serious substantive opposition to

¹ filed May 31, 2002.

TCC's January 2, 2002 filed Motion to Accept Previously filed Amendment to Petition for Rule Making ("*Motion*"). Thus, in consideration of the failure of Bell to offer any compelling reason why the Commission should not grant TCC's *Motion* in light of the public interest benefits that would result from its acceptance, consideration, and grant, TCC respectfully requests that the Commission accept for filing the Amendment to Petition for Rule Making filed on December 12, 2001 ("*December 12th Amendment*"). In support of this request, the following is stated:

1. Bell attempts to raise, but fails to substantiate, three primary objections to TCC's *Motion*. See *Opposition* at 2. First, it claims that TCC's *Motion* must be rejected because the underlying *December 12th Amendment* is substantively defective. Second, it accuses TCC of not acting in good faith and the *Motion* thus deserving of denial by the Commission. Finally, and even though its pleading is styled only as an opposition to the *Motion*, Bell goes on to claim that TCC's January 22, 2002 filed Petition for Reconsideration was untimely filed, and as such is fatally defective.² Each of these points are easily disposed of in the sections that follow.

2. First, Bell wrongly attempts to use this filing to address the substantive merits of the underlying pleadings- TCC's *December 12th Amendment* and a later filed supplement³- in spite of the fact that its filing is only formally directed at the *Motion*. See *Opposition* at 2-3. Bell has already raised these same issues in filings made March 8th and March 15th, respectively.⁴ Thus

² See Petition for Reconsideration filed on behalf of Television Capital Corporation of Richmond January 22, 2002 ("*Petition for Reconsideration*").

³ See Supplement to Petition for Rule Making filed on behalf of Television Capital Corporation of Richmond March 7, 2002 ("*Supplement*").

⁴ See "Opposition of Bell Broadcasting to Amendment to Petition for Rule Making" (filed March 8, 2002) and "Opposition of Bell Broadcasting to Supplement to Amendment to Petition for Rule Making" (filed March 15, 2002).

TCC sees no need to further obscure the instant issue of the acceptability of the *Motion* by following Bell down the path of repetitiveness and will decline to address those issues again.

3. Second, Bell completely misunderstands TCC's intentions in filing the *Motion*, mistaking a simple interpretation of the Commission's rules regarding service for some masterful stroke of gamesmanship calculated to put Bell at a tactical disadvantage. *See Opposition* at 3. Rather than engaging in a grand plan to have Bell Broadcasting waste resources and time, TCC simply did not believe that it was required under §1.47 to serve Bell in this matter, as the Letter to Vincent A. Pepper from Clay C. Pendarvis, Chief, Television Branch dated October 23, 2001 ("*Dismissal Letter*") had clearly not been served on any party to this proceeding, nor was it available to anyone outside the Commission. *See Motion* at para 6 (noting TCC's initial conclusion that a formal Petition for Reconsideration may not be proper, given the lack of public notice of the dismissal). Instead, TCC treated the filing of the *Motion* as a simple a matter of addressing an error on the Commission's part by failing to provide any notice whatsoever of its dismissal of TCC's application and related allotment proposal. TCC responded in a manner which it believed could be easily and quickly addressed by the *Motion*, without affecting the larger substantive issues at hand in the proceeding. As a result, TCC in good faith served only the author of the *Dismissal Letter*, the Chief of the Television Branch, Clay Pendarvis. *See Exhibit 2 to Opposition*. Indeed, there is no indication that the *Dismissal Letter* was served on any party to this proceeding, and Bell's *Opposition* confirms that it never received a copy of the *Dismissal Letter*.

4. Even if service of the *Motion* were required, Bell was not prejudiced by the lack of service.⁵ TCC served the *December 12th Amendment* on Bell and all other parties in the proceeding. *See Exhibit 1 to Opposition*. Rather than undermine TCC's *Motion*, Bell's own recognition that it had not received a copy of the *Dismissal Letter* and that it was unable to find a copy of it in the Commission's public files adds further evidence to support TCC's contention that neither it nor any other party to this proceeding had any notice whatsoever of the October 23rd dismissal. *See Opposition* at 3; *Motion* at 1. In short, TCC's *Motion* was filed in good faith with the Commission, and without prejudice to the rights of other parties to the proceeding.

5. Finally, Bell attempts to take a second shot at essentially the same target by attacking TCC's Petition for Reconsideration as untimely filed. *See Opposition* at 4. In this case, Bell focuses on an alleged failure of TCC to show that it meets the three point "extraordinary circumstances" test of *Gardner*, which requires that a petitioner show: 1) "When and how he received notice in fact"; 2) "that the time remaining was inadequate to allow him to reasonably meet the 30-day requirement (from date of issuance) of §405" ; and 3) "that he moved for reconsideration promptly on receiving actual notice." *See Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976)("Gardner"). Bell asserts that TCC failed on all three points. *See Opposition* at 4.

6. This claim, of course, is plainly wrong. TCC very clearly established that its filing fit neatly within the three points of *Gardner* to the extent *Gardner* applies. First, the Petition for Reconsideration established that TCC received knowledge of the dismissal for the first time on

⁵ TCC trusts that Bell is aware of the irony of its own footnote four, which specifically requests waiver of the Commission's response deadlines because it had not received direct notice of an earlier filing- the very same request made by TCC that Bell now attempts to characterize as an unreasonable request by TCC. *See Opposition* at 2.

December 21, 2001. *See* Petition for Reconsideration at paras 2 and 5. It then clearly illustrated that TCC could not have filed a petition for reconsideration within 30 days of the date on the *Dismissal Letter* because TCC did not have knowledge of the *Dismissal Letter* until 59 days later. The Commission simply never made the *Dismissal Letter* available to anyone outside the Commission prior to December 21, 2001. *See* Petition for Reconsideration at paras. 2-5; *see also* *Opposition* at 3. Finally, that TCC moved promptly upon receiving notice is self-evident - it filed the *Motion* within 12 days of learning of the dismissal and the near-identical Petition for Reconsideration within the time required by §1.106(f) of the Commission's Rules. *See* Petition for Reconsideration at para 5 (noting that §1.106(f) permits actions to be reconsidered within 30 days of *public notice*, which still has not yet been provided).

7. Bell's bald assertion that TCC failed to show when and how it received knowledge of the *Dismissal Letter* cannot obscure the fact that this information is set forth very clearly and plainly by both TCC's *Motion* and the Petition for Reconsideration. *See Opposition* at 6 (while Bell claims to be attacking the Petition for Reconsideration here, it intermittently refers to the *Motion*, which was filed 20 days earlier.). Both the Petition for Reconsideration and the *Motion* plainly state that the "first time TCC's counsel was made aware of the dismissal was the result of a phone call by Nazifa Naim of the Mass Media Bureau to an associate with this firm, Mark Blacknell, on December 21, 2001." Petition for Reconsideration at para 2; *Motion* at para 3. Having apparently misunderstood this plain statement, Bell then attempts to make much of the fact that Mark Blacknell did not execute an affidavit attesting to the facts contained within the pleading, in spite of the fact that "given that Mr. Blacknell signed the pleading, he was plainly available [to do so]." *See Opposition* at 6. Bell is being disingenuous with this argument—it should no doubt be aware that the Commission's Rule §1.52 requires that the signature of any

attorney submitting a pleading to the Commission means that “he has read the document [and] that to the best of his knowledge, information, and belief there is good ground to support it[.]” Clearly Mr. Blacknell’s signature on both the *Motion* and the Petition for Reconsideration certifies his personal knowledge of the factual allegations as set forth within.⁶

8. Because the Commission had not given “public notice” of the dismissal of TCC’s application and related rulemaking petition, it was the judgment of TCC that it would be more proper to file a simple motion to accept the *December 12th Amendment*, rather than submit a formal reconsideration petition. Nevertheless, out of an abundance of caution, TCC later elected to file a formal Petition for Reconsideration. TCC did so in a timely manner, assuming that receipt of the *Dismissal Letter* by fax constituted “public notice” in accordance with Section 1.4(b)(5) of the rules. In short, TCC’s filing of first the *Motion* and then the Petition for Reconsideration represented an attempt at covering all procedural bases. Indeed, as Bell itself so helpfully points out, the *Motion* and the later filed Petition for Reconsideration were virtually identical in substance, with the Petition for Reconsideration only adding some procedural background and an additional engineering exhibit. *See Opposition* at 7, fn. 17.

9. Finally, it is clear the Commission still retains jurisdiction over this matter, despite Bell’s claims to the contrary. *See Opposition* at 8-10. All of Bell’s arguments and claims regarding timeliness and jurisdiction are predicated upon *one* fact that it has utterly failed to establish - that there had been “public notice” of the Commission’s dismissal of TCC’s

⁶ *See Motion* at para. 7 (“Thus, in light of the fact that TCC received no notice of dismissal, no notice of dismissal was given to counsel of other parties involved in the proceeding, and as there was no public notice given regarding the dismissal[.]”). Although TCC does not believe it is necessary, attached to this Response is an Affidavit signed by Mark Blacknell attesting to the very same facts already set forth in the original Motion. See the attached Affidavit of Mark Blacknell, Esq.

application and related allotment proposal sometime prior to Ms. Naim's call to TCC's counsel on December 21, 2001. Section 1.4(b)(5) of the rules provides as follows:

If a document is neither published in the *Federal Register* nor released, and if a descriptive document entitled "Public Notice" is not released, the date appearing on the document *sent* (e.g., mailed, telegraphed, etc.) *to persons affected by the action*.

47 C.F.R. §1.4(b)(5) (emphasis added). In this case, the Commission *still* has not provided "public notice" of the dismissal of TCC's application and related rulemaking petition because, even assuming that Ms. Naim's faxing of the October 23, 2001 *Dismissal Letter* to TCC's counsel constitutes "sending" the document pursuant to the above rule provision, it never "sent" the *Dismissal Letter* to the parties to this proceeding, *i.e.*, the "persons affected by the action." as contemplated by §1.4(b)(5). Indeed, Bell's *Opposition* establishes that, despite its status as a party to this proceeding, the Commission did not serve it with a copy of the *Dismissal Letter*.

10. Nevertheless, even assuming *arguendo* that the Commission's faxing of the *Dismissal Letter* to TCC's counsel on December 21, 2001 constituted "public notice" pursuant to Section 1.4(b)(5) of the Commission's rules, as demonstrated by both TCC's *Motion* and Petition for Reconsideration, there was certainly no "public notice" of the dismissal prior to December 21, 2001. *See Motion* at paras. 3 - 7 and Petition for Reconsideration at paras. 2 - 5. Bell not only fails to refute this point, but instead adds evidence in favor of it - admitting that even its own independent efforts were unable to find the *Dismissal Letter* in the Commission's public files. *See Opposition* at 2. In light of the clear evidence establishing the fact that TCC had no knowledge of the dismissal until December 21, 2001, and that there still has been no public notice regarding the matter, TCC respectfully submits that the Commission still has clear jurisdiction, and may properly accept and consider the merits of the timely-filed *Motion* and Petition for Reconsideration.

11. Beyond the fact that the Commission's rules clearly allow it to undertake such an action, the equities also support granting TCC's request. The fact that Bell was not served with either the *Motion* or Petition for Reconsideration is immaterial because TCC filed both its pleadings within 30 days of public notice of the dismissal (assuming, of course, that "public notice" occurred under Section 1.4(b)(5) by faxing the letter and bringing the letter's existence to TCC's attention). There is no prejudice to Bell because the Commission now has heard its arguments on this issue.

12. In conclusion, TCC submits that it has refuted Bell's *Opposition* point by point, having clearly established that both its *Motion* and Petition for Reconsideration were properly filed in good faith. Furthermore, it respectfully reminds the Commission that the public interest would obviously be served by accepting TCC's December 12, 2001 filed Amendment to Petition for Rule Making, grant of which would allow the substitution of Channel 39 for the existing Channel 63 allotment at Richmond, Virginia and the subsequent designation of that channel for TCC's application, as it would clear the way for reallocation of the upper 700 MHz spectrum band, and expedite the inauguration of a new television service to Richmond.

WHEREFORE, TCC requests that the Commission accept for filing the Amendment to Petition for Rule Making received by the Commission on December 12, 2001.

Respectfully submitted,

TELEVISION CAPITAL CORPORATION
OF RICHMOND

By:


Vincent A Pepper


Mark Blacknell

Counsel to Television Capital Corporation
of Richmond

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& Rice, PLLC
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June 24, 2002

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Richmond)	
)	
For a Construction Permit for a New)	
Television Broadcast Station on)	
Channel 63 in Richmond, Virginia)	

**AFFIDAVIT OF
MARK BLACKNELL**

Before the undersigned notary, duly qualified to administer oaths, came Mark Blacknell, who, upon penalty of perjury, said:

This Affidavit is being offered in support of the simultaneously filed Response to Opposition to Motion to Accept Amended Petition for Rule Making filed in the above captioned proceeding. The undersigned, an associate in the same law firm as Vincent A Pepper, addressee of a letter dated October 23, 2001 (Ref. No. 2-A842), from Clay C. Pendarvis, Chief, Television Branch, Video Services Division, Mass Media Bureau has no knowledge of the firm ever actually receiving the letter, which dismissed a Petition for Rule Making filed on behalf of Television Capital Corporation of Richmond. The

Petition for Rule Making which the letter dismissed was originally filed with respect to a pending application for a new NTSC television station at Richmond, Virginia. As evidence that neither myself nor Vincent A Pepper ever received such notice, I offer the following:

I was first made aware of the dismissal on December 21, 2001, when I received a call from Nazifa Naim of the Mass Media Bureau inquiring as to why I had submitted an amendment on December 12th to a petition that had been dismissed in October. Quite surprised by her question, I questioned her further about the method of the purported dismissal, as I had never before been aware that the Commission had taken such an action. When informed that the petition had been dismissed by a letter from Clay Pendarvis, I requested that Ms. Naim fax me a copy of the dismissal letter. After receiving a copy of that letter by fax, I then brought that fax to Vincent A Pepper's attention. To this date, this remains the only evidence of dismissal that I possess or of which I am aware.

Thus, the above facts and statements considered, I submit that neither Television Capital Corporation of Richmond, nor its counsel, ever received notice of dismissal of the Petition for Rulemaking filed July 17, 2000 prior to the December 12th filing of the Amendment to Petition for Rule Making.

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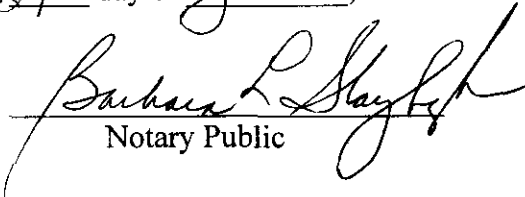
Further affiant sayeth not.



Mark Blacknell

Sworn to before me this

24th day of June, 2002.



Notary Public

My Commission Expires July 31, 2003

CERTIFICATE OF SERVICE

I, Lisa A. Blackburn, a secretary in the law firm of Womble Carlyle Sandridge & Rice, PLLC, do hereby certify that on this 24th day of June, 2002, copies of the foregoing "Motion for Extension of Time" were mailed, postage prepaid, to the following:

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Lisa A. Blackburn

*Via Hand Delivery